Goodwill Industries of North Georgia, Inc. *and* International Union of Operating Engineers, Local 926, AFL–CIO. Case 10–RC–15312

June 21, 2007

DECISION ON REVIEW AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

The sole issue in this case is whether disabled janitorial workers employed by Goodwill Industries of North Georgia, Inc. (the Employer) at the Chamblee, Georgia campus of the Centers for Disease Control (CDC Chamblee) have a primarily rehabilitative, rather than a typically industrial, relationship with the Employer and therefore are not "employees" within the meaning of Section 2(3) of the Act.

In his Decision and Direction of Election, the Acting Regional Director included the disabled workers in the unit, finding that the Employer had failed to show that its relationship with those workers is primarily rehabilitative. In accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Acting Regional Director's decision, and the Petitioner filed a brief in opposition. On November 8, 2002, the Board granted the Employer's request for review. Thereafter, the Employer and Petitioner filed briefs on review.

After the Acting Regional Director issued his decision in this case, the Board issued its decision in *Brevard Achievement Center*, 342 NLRB 982 (2004). In that case, the Board reexamined and reaffirmed the "typically industrial/primarily rehabilitative" standard, applied by the Acting Regional Director here, in assessing the statutory employee status of disabled individuals working in rehabilitative vocational settings.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having reviewed the record and the parties' briefs, and for the reasons set forth below, we conclude, in accord with the Acting Regional Director, that the disabled individuals performing janitorial services for the Employer at CDC Chamblee are "employees" within the meaning of Section 2(3) of the Act.[1]

I. FACTS

The Employer is a nonprofit corporation engaged in the business of rehabilitating and providing employment assistance and experience to persons with barriers to employment. The Employer's operations consist of three revenue-generating departments—donor services, career services, and contract services—and two support departments—human resources and finance. The donor services department collects and processes donations. The career services department provides evaluation, training, and preparation for competitive employment to persons with barriers to employment, including individuals with drug or alcohol problems, individuals with mental retardation or cerebral palsy, individuals participating in welfare-to-work programs, and dislocated workers. The contract services department procures and maintains contracts for the provision of services to various Federal agencies pursuant to the Javits Wagner O'Day (JWOD) Act.[2]

Among the several JWOD contracts maintained by the Employer is the one involved here for the provision of janitorial services at CDC Chamblee. In connection with this contract, the Employer employs 26 nonsupervisory workers, who perform general cleaning and floor-care duties for 20 buildings on the CDC campus.[3] Of the 26 workers, 20 have been classified by the Employer as disabled, and 6 as nondisabled.[4]

[1] We disagree, however, with certain aspects of the Acting Regional Director's application of the "typically industrial/primarily rehabilitative" standard to the facts of this case. See infra fns. 26, 33.

Member Liebman dissented in *Brevard*, supra, both from the Board's reaffirmation of the "typically industrial/primarily rehabilitative" standard and from the result reached applying that standard to the facts of the case. 342 NLRB at 989 (dissent of Member Liebman and Member Walsh). Acknowledging *Brevard* as controlling precedent, she joins in this opinion. She would also find the disabled workers involved here to be statutory employees applying the plain-language test advocated by the *Brevard* dissent.

[2] The JWOD Act provides a framework through which qualified organizations—those in which, inter alia, at least 75 percent of the "work-hours of direct labor" are performed by individuals who are incapable of independently obtaining and keeping a job in a competitive work environment—may compete for and obtain Federal contracts for the provision of services. See 41 U.S.C. §§ 46–48.

[3] In addition to the nonsupervisory workers, the Employer employs a project manager, who oversees the Employer's contract with the CDC at three different sites, including CDC Chamblee; a site manager, who oversees daily activities at CDC Chamblee; and one supervisor, who ensures that the workers complete their duties in a satisfactory manner. No party seeks to include these individuals in the unit.

[4] To maintain a contract under the JWOD Act, a qualified nonprofit organization is required to employ blind or severely disabled individuals for at least 75 percent of the "work hours of direct labor" necessary to furnish goods and services. 41 C.F.R. § 51-1.3. A person with a severe disability is defined as "a person other than a blind person who has a severe physical or mental impairment . . . which so limits the person's functional capabilities . . . that the individual is unable to engage in normal competitive employment over an extended period of time." Id. Each participating employer is required to maintain in each disabled worker's file a "written report signed by a licensed physician, psychiatrist, or qualified psychologist, reflecting the nature and extent of the disability or disabilities that cause such person to qualify as a person with a severe disability." 41 C.F.R. § 51-4.3(c)(1).

There is little record evidence regarding the nature or extent of the disabilities of the workers at issue in this case. The Employer's vice president of human resources, John Mayfield, testified that the individuals "might have" physical, visual, auditory, or cognitive impairments. The Employer's project manager, Willie Merritt, testified that, unless a particular individual's disability is apparent, he does not know the nature of the workers' disabilities. The only pertinent documentary evidence submitted by the Employer—a report prepared by a psychiatrist retained by the Employer—merely contains the names of the workers, followed by the conclusory designation "yes" or "no" under the heading "disabled."[5] As to specific examples of the workers' disabilities, the evidence is limited to references to hearing impairment,[6] diabetes, high blood pressure, and cholesterol.[7] Included among those classified as disabled are the Employer's supervisor and site manager, the highest-ranking personnel working at the Chamblee campus. Mayfield testified that, for purposes of evaluating disability status, the Employer uses the definition of "disability" set forth in the Americans with Disabilities Act (ADA).

The Employer's witnesses testified that the Employer actively recruits individuals with disabilities. They also acknowledged, however, that they often do not know the nature of an individual's disability, or even whether he or she is disabled, at the time of hire.[8] Both Mayfield and Merritt testified that newly hired employees work at CDC Chamblee for approximately 90 to 120 days before they are evaluated for disability status by the Employer-retained psychiatrist. Merritt also testified, however, that he might be aware of an individual's disability prior to the psychiatrist's evaluation, either through information provided by the person in an application or interview, or through observation.

The workers whom the Employer classifies as disabled work the same hours, receive the same wages and fringe benefits, and are subject to the same supervision and work rules[9] as the nondisabled workers. In addition, all of the workers, disabled and nondisabled, perform general cleaning tasks.[10] Project Manager Merritt testified that the Employer assigns disabled workers to areas that are "easier" to clean, e.g., smaller buildings or the less-trafficked upper floors of buildings. Two former supervisors, on the other hand, testified that, as supervisors, they were never made aware of the workers' disabilities, nor were they provided any guidance as to the types of assignments disabled workers should receive. Accordingly, they simply exercised their discretion in meting out assignments. Elsie Inez Hines, one of the former supervisors, further testified that the Employer specifically told her not to make any accommodations for the disabled workers, and that doing so would be tantamount to "feeling sorry for them." In addition, Hines and another witness, nondisabled worker Jaclyn White, both testified that there are no differences in the work performed by the various individuals on their respective shifts.[11]

All of the Employer's workers are expected to complete their assigned duties by the end of their 8-hour shifts. However, Merritt testified that, if a disabled worker were unable to complete his assigned duties, the Employer would accommodate that individual by modifying his job duties.[12] By contrast, if a nondisabled

[5] Project Manager Merritt testified that any individuals appearing in the "yes" column will be treated as disabled for the duration of their tenure with the Employer.

[6] Project Manager Merritt testified that he considered the hearing-impaired individual incapable of maintaining a job in a competitive work environment because "without some[one] around him who recognizes his form of sign language, it would be very difficult for [the individual] to work and be functional in an environment outside of this particular environment."

[7] The individual with high blood pressure and cholesterol, Elsie Inez Hines, was formerly a supervisor for the Employer and, at the time of the hearing, was employed as a general cleaner. Hines testified that she was unaware that the Employer considered her to be a "disabled" worker.

[8] Mayfield testified that individuals may obtain employment with the Employer by responding to ads placed by the Employer in local newspapers, by "walk[ing] in from the street," through referral from "outside funding sources," such as other nonprofit organizations that work with disabled people, and through referral from the Employer's career services division.

With respect to the 20 disabled workers at issue in this case, the record shows that six were referred through the Employer's career services division, six were referred from an outside funding source, and eight were hired "off the street."

[9] Project Manager Merritt testified that, although the disabled workers are subject to the same employee handbook and work rules as the nondisabled workers, the Employer treats the two groups differently with respect to *enforcement* of the work rules.

[10] In general, both the disabled and nondisabled workers come to the Employer already knowing how to perform the requisite cleaning tasks; thus, it is often unnecessary for the Employer to provide training to new workers. However, Merritt testified that the Employer trains its workers to perform the cleaning tasks in the specific manner preferred by the Employer.

[11] White acknowledged that various workers occupying her job classification, floor technician, perform varying tasks relating to floor care, some of which are more difficult than others. However, White, a nondisabled worker, does not perform any of the floor-care tasks identified as "more difficult" (e.g., stripping and refinishing floors, shampooing carpets). In addition, Project Manager Merritt testified that some disabled workers perform those more difficult tasks.

[12] As an example, Merritt described the experience of a new disabled worker who was unable to perform one of the requisite tasks of her cleaning assignment (tying trash-can liners in conjunction with waste removal). Merritt testified that the Employer "created" a position for the individual by eliminating the waste-removal duty and assigning her to dusting and vacuuming only.

worker were unable to perform his assigned duties, the Employer would not modify his job duties but, rather, would apply its progressive disciplinary procedures.

In a similar vein, Merritt testified that the Employer disciplines its disabled workers more leniently than its nondisabled workers. As an example, Merritt contrasted a disabled worker who, prior to termination, was counseled[13] six times for failing to perform his assigned work duties with a nondisabled worker who was counseled only three times for inadequate job performance prior to discharge. In addition, Merritt compared the 1-day suspension of a disabled worker for refusing to perform an assigned task (because the worker wanted first to complete a different task that he believed to be a higher priority) to the suspension and discharge of a nondisabled worker for instigating an altercation and subsequently failing to heed a supervisor's instructions.

The Employer makes available to its disabled workers various services and opportunities that are not available to the nondisabled workers. In particular, the Employer emphasizes the availability of counseling services. Disabled workers referred to the Employer through its career services division are assigned to case managers[14] and job coaches,[15] to whom they can turn for assistance with job-related or personal matters. According to the Employer, its rehabilitation services are available to all of its disabled workers, regardless of how they are placed with the Employer.[16] In addition, disabled workers referred to the Employer by another rehabilitation provider are assigned, by the referring provider, a counselor/case manager. However, the Employer's contracts division—the division that actually employs the disabled workers—does not provide any counseling services. There is no counselor on site at CDC Chamblee.

The evidence concerning the counseling and rehabilitation services provided by the Employer suggests that such services are rather limited in scope. For example, vice president of career services, Sheryl Cornett, testified that case managers provide "guidance [rather] than true counseling."[17] There is no record evidence illuminating the extent or duration of the disabled workers' contacts with their assigned case managers or job coaches. Project Manager Merritt testified that a disabled worker will be given a break to meet with his or her case manager or job coach during the workday, but there is no evidence of how frequently that happens. Merritt acknowledged that he is not "aware of everything that goes on with [the disabled workers] who come[] from an outside source." Former supervisor (and current employee) Hines, classified as disabled, testified that she had been working for the Employer for approximately 6 years, that she had been unaware of the existence of the career services division until the previous year, and that she had never been assigned to a counselor or received any counseling during her tenure with the Employer.

Merritt testified generally that the Employer provides breaks to allow disabled workers to take medication. However, former Supervisor Hines described a specific situation in which a diabetic individual, classified as disabled, was denied his regular lunchbreak and became weak due to his inability to eat lunch or take his medication.

Finally, with respect to helping disabled workers secure employment in the competitive labor market, Merritt described a hearing-impaired worker who, with the assistance of the Employer's career services division, obtained outside employment. On cross-examination, however, Merritt testified that only one disabled worker was referred for outside employment in the 2 years preceding the hearing, and that only four or five disabled workers had been referred for outside employment in the prior 5 years. The Employer does not employ a job-placement coordinator.

II. THE ACTING REGIONAL DIRECTOR'S DECISION

Citing *Goodwill Industries of Tidewater*, 304 NLRB 767 (1991), and *Goodwill Industries of Denver*, 304

[13] In describing the counseling provided to the disabled worker, Merritt testified that he spoke to the individual to ascertain what was preventing him from completing his duties; and when the worker said that he "didn't feel like" performing the tasks, Merritt told him that it was important for him to complete his assigned duties and that the Employer expected him to do so.

[14] The case manager serves as a "community resource broker," assisting with securing such services as child care, substance abuse treatment, and transportation.

[15] The job coach is available on an as-needed basis to assist disabled workers with job-related difficulties. For example, the job coach might provide an orientation to a worker on his first day on the job, or instruction or other assistance to a worker who is having difficulty learning or performing a particular task.

[16] In this regard, Merritt described a disabled worker who had been referred to the Employer from an outside funding source, and who was having difficulty completing all of her assigned tasks. Merritt testified that "he worked with that employee over a course of about three months, just to get her to complete her tasks and complete [them] satisfactorily." When this worker's problems resurfaced several months later, Merritt contacted career services to "counsel" the individual. The record contains no evidence regarding the nature or duration of this "counseling."

[17] Cornett testified that, if a case manager were unable to meet the needs of a particular disabled worker, the Employer nevertheless could refer the worker to a mental health counselor or other appropriate provider. Cornett's testimony on this point suggested that the Employer's role in such a context would be limited to connecting the worker with the appropriate resource. (Cornett indicated, for example, that the disabled worker's "funding source," rather than the Employer, would pay for the requisite services.)

NLRB 764 (1991), the Acting Regional Director (ARD) applied the "typically industrial/primarily rehabilitative" standard (discussed more fully below) and found that the relationship between the disabled workers and the Employer is not primarily rehabilitative.[18] Accordingly, the ARD concluded that the Employer's disabled workers at CDC Chamblee are statutory employees.

First, the ARD found that, although the Employer's witnesses testified generally that the Employer makes available various support services, training, and rehabilitative assistance to all of its disabled workers, the evidence did not establish that the Employer actually provides such services or assistance. The ARD found that there was no evidence that the disabled workers who were hired "off the street" or were referred from an outside funding source took advantage of any such services or were even aware of their existence. With respect to disabled workers referred from the Employer's career services division, there was no specific evidence that the Employer provided any counseling or rehabilitative services to the workers on a regular basis and, if it did, what the nature of those services was.

Second, the ARD found that, although the Employer is more flexible in matters of discipline with its disabled workers than with its nondisabled workers, the fact that the disabled workers are subject to severe disciplinary sanctions (albeit following additional counseling) suggests the progressive disciplinary procedures typical of private-sector workplaces.

Third, the ARD found "insufficient evidence to establish any significant track record geared toward outside placement of the disabled individuals." In so finding, the ARD noted that there is no significant difference between the disabled and nondisabled workers in terms of their duration of employment with the Employer; very few disabled workers (only one within the 2 years prior to the hearing) actually leave the Employer's employ; and the Employer does not employ a job-placement coordinator.

Finally, with respect to working conditions and terms of employment, the ARD observed that the disabled and nondisabled workers work the same hours under the same supervision, and they receive the same wages and benefits. The ARD found the absence of any wage differential based on merit or productivity probative of a lack of rehabilitative purpose. The ARD further found that the evidence relating to job assignments and productivity standards revealed "a mixed bag." Specifically, although the Employer may afford greater leniency to the disabled workers with respect to job assignments and completion, the Employer has not implemented any minimum productivity standards or other means of assessing the disabled workers' progression toward competitive employment in the private marketplace.

[18] In so finding, the ARD placed the burden to prove the rehabilitative nature of the relationship on the Employer.

III. ANALYSIS

A. Burden of Proof

As noted above, the ARD placed on the Employer the burden to demonstrate the primarily rehabilitative nature of its relationship with its disabled workers.[19] In addition, the Petitioner, in its brief on review, contends that the Employer bears the burden of proof on this issue. Neither the Board nor the Federal courts have ever explicitly addressed the burden of proof in cases applying the "primarily rehabilitative" standard. The majority opinion in *Brevard Achievement Center*, supra, similarly was silent on this issue.[20]

We agree with the ARD's placement of the burden. In analogous contexts, the party seeking, as the Employer does here, to exclude otherwise eligible employees from the coverage of the Act has been held to bear the burden of proof in that regard. See, e.g., *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711–712 (2001) (upholding Board rule that party seeking to exclude persons as supervisors bears the burden of proof); *BKN, Inc.*, 333 NLRB 143, 144 (2001) (party asserting independent contractor status bears burden of proof); *Allstate Insurance Co.*, 332 NLRB 759 (2000) (party asserting supervisory or managerial status bears burden of proof); *AgriGeneral L.P.*, 325 NLRB 972 (1998) (party claiming exemption of agricultural employees bears burden of proof). Accordingly, we hold that the burden to prove that an employer's relationship with its disabled workers is primarily rehabilitative, thus excluding those workers from statutory employee status, rests with the party asserting that exclusion.

B. Application of the Typically Industrial/Primarily Rehabilitative Standard

In *Brevard Achievement Center*, supra, the Board reaffirmed the "typically industrial/primarily rehabilitative" standard for determining the statutory employee status of disabled individuals working in rehabilitative vocational programs. Under this standard, the Board examines the

[19] The ARD did not explicitly state that the burden of proof rests with the Employer, but such is implicit in his statement that "the Employer has failed to show that its relationship with the 20 disputed workers is primarily rehabilitative."

[20] The dissenting opinion in *Brevard*, however, squarely placed the burden of proof on the party asserting that disabled workers are not statutory employees. 342 NLRB at 995.

nature of the relationship between the disabled workers and their employer:

> If the relationship is guided primarily by business considerations, such that it can be characterized as "typically industrial," the individuals will be found to be statutory employees; alternatively, if the relationship is "primarily rehabilitative" in nature, the individuals will not be found to be employees. In conducting this analysis, the Board examines numerous factors including, inter alia, the existence of employer-provided counseling, training, or rehabilitation services; the existence of any production standards; the existence and nature of disciplinary procedures; the applicable terms and conditions of employment (particularly in comparison to those of nondisabled individuals employed at the same facility); and the average tenure of employment, including the existence/absence of a job-placement program.

Brevard, at 984.

Applying that standard to the facts of the case, and relying on its prior decisions in *Goodwill Industries of Tidewater*, supra at 767, and *Goodwill Industries of Denver*, supra at 764, the Board in *Brevard* concluded that the employer's relationship with its disabled workers was primarily rehabilitative and, accordingly, that the disabled workers were not statutory employees. In so concluding, the Board emphasized the training and counseling services provided by the employer, its application of different disciplinary standards to its disabled workers (who were not subject to production standards), and its success in transitioning those workers into private employment.

In *Brevard,* a trainer, present at the worksite 3 days per week, trained both new disabled workers and those whose performance had regressed. A mental health counselor, who worked half days at the worksite, provided counseling, problem resolution, and crisis-intervention services to the disabled workers on an as-needed basis. The employer also provided disabled workers assistance with daily-living activities such as check writing, shopping, and preparing meals and, additionally, provided financial assistance for outpatient mental-health services. Finally, the employer did not subject its disabled workers to production standards or the progressive discipline procedures it applied to its nondisabled workers, but rather applied a counseling-oriented model of discipline, and the evidence established that the disabled workers "routinely" transitioned to private employment.

The facts of the instant case resemble those in *Brevard* to a certain extent.[21] On closer examination, however, the record in this case reveals important differences from the record in *Brevard*. As explained below, we find that, unlike the employer in *Brevard*, the Employer here has not met its burden to establish that its relationship with its disabled workers is primarily rehabilitative. Accordingly, we conclude that the workers at issue here are statutory employees.

Preliminarily, in contrast to the evidence in *Brevard* that 80 to 85 percent of that employer's disabled workers were either mentally impaired or had severely disabling mental illness, 342 NLRB at 982, the evidence here presents a far different picture. Although Human Resources Vice President Mayfield testified that the disabled workers "might have" physical, visual, auditory, or cognitive impairments, examples of *specific* disabilities of the Employer's workers are limited to hearing impairment, diabetes, high blood pressure, and cholesterol. Included among those the Employer classifies as disabled are the highest-ranking personnel working at CDC Chamblee, the site manager and supervisor.

Revealingly, Mayfield testified that, for purposes of evaluating disability status, the Employer uses the definition of "disability" set forth in the ADA. The ADA defines "disability," in relevant part, as "a physical or mental impairment that substantially limits one or more . . . major life activities." 42 U.S.C. § 12102(2)(A). The ADA prohibits discrimination against any "qualified individual with a disability," id. § 12112(a), and defines "qualified individual with a disability," in relevant part, as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires," id. § 12111(8). Thus, the ADA contemplates that a "disability" as defined therein would not necessarily exclude a disabled individual from normal competitive employment. Under the JWOD Act, by contrast, a severely disabled person is one whose physical or mental impairment "so limits the person's func-

[21] As in *Brevard*, the Employer provides general cleaning services to a Federal Government agency pursuant to a contract obtained under the JWOD Act. The Employer maintains a work force comprised largely (77 percent) of individuals classified as disabled. Further, several Employer witnesses testified generally that "counseling" (or at least "guidance") is available to the disabled workers through case managers and job coaches—assigned to *some* of the disabled workers—or, alternatively, through the Employer's career services division; that although the disabled workers generally perform the same cleaning tasks, work the same hours, and are subject to the same supervision as the nondisabled workers, the Employer affords greater latitude to the disabled workers in terms of their performance or completion of job duties; and that the Employer disciplines its disabled workers more leniently than its nondisabled workers.

tional capabilities . . . that the individual is unable to engage in normal competitive employment over an extended period of time." 41 C.F.R. § 51-1.3. It seems likely that a person could have a disability for ADA purposes without being severely disabled under the JWOD Act. Indeed, the ADA's definition of "qualified individual with a disability" assumes what the JWOD Act excludes: the ability "to engage in normal competitive employment."

Although it is not the Board's province to police an employer's compliance with the requirements of the JWOD Act, the nature of the disabilities of workers the Employer classifies as disabled, and the standard the Employer applies in making those classifications, are relevant to our determination of those workers' statutory employee status. To exclude those workers from 2(3) status, the Employer has the burden of showing that its relationship with its disabled workers is primarily rehabilitative. As discussed below, an examination of the *Brevard* factors demonstrates that, on this record, the Employer has failed to carry that burden.

1. Counseling and rehabilitative services

As the Employer emphasizes in its brief on review, counseling and rehabilitative services need not be mandatory for the Board to find a primarily rehabilitative relationship. See *Brevard*, 342 NLRB at 986; see also *Baltimore Goodwill Industries v. NLRB*, 134 F.3d 227, 231 (4th Cir. 1998). In *Brevard*, the Board found such a relationship where counseling and rehabilitative services were simply made available to disabled workers. Here, however, we have some doubt whether the Employer has sufficiently established that substantive counseling and rehabilitative services are genuinely available to all of its disabled workers. But assuming the availability of such services, their nature and scope is more limited here than in *Brevard*.

As stated above, in *Brevard,* the employer employed a trainer who worked on site 3 days a week providing job training to disabled workers. The employer also employed a mental health counselor who worked on site every day providing counseling, problem resolution, and crisis-intervention services. The disabled workers in *Brevard* received assistance with daily-living activities, such as shopping, paying bills, and preparing meals. The employer in *Brevard* also referred its disabled workers to a mental-health agency for medication checks and counseling; when necessary, it also provided financial assistance for outpatient mental health services. 342 NLRB at 983.

Here, the counseling and rehabilitative services provided by the Employer are considerably less extensive than those in *Brevard*. The Employer does not employ either an on-site trainer or an on-site counselor. Indeed, it employs no one at CDC Chamblee in a counseling or rehabilitative capacity. It does not furnish financial assistance to disabled workers who may require the services of outside providers, such as outpatient mental-health services. The six individuals referred to the Employer through its career services division have been assigned to job coaches and case managers, to whom they can turn for assistance with job-related or personal matters, respectively. However, there is no evidence regarding the nature or extent of these workers' contacts with their case managers or job coaches.[22] Disabled workers referred through outside funding sources may be assigned to a counselor or case manager, not by the Employer, but by *the outside funding source*. Thus, any counseling or rehabilitative services provided by such individuals—and there is no specific evidence concerning such services—do not evidence a rehabilitative relationship between disabled workers *and the Employer*.[23] Although the Employer's witnesses testified that the Employer's own rehabilitation services, through its career services division, are available to *all* of its disabled workers, not just to those referred through career services, the record is undeveloped in this regard.[24] In addition, Elsie Inez Hines, who previously had served as a supervisor for the Employer, testified that, although she had worked for the Employer for 6 years as of the date of the hearing, she had been unaware of the existence of career services until the previous year.[25]

[22] We recognize that, in *Brevard*, the Board found a primarily rehabilitative relationship notwithstanding that, as here, counseling services were merely made available. However, those services were more readily available in *Brevard* by virtue of the on-site presence of a trainer and counselor; and, as explained herein, other factors supporting a "primarily rehabilitative" finding in *Brevard* are absent here. Moreover, *Brevard* did not hold that the extent to which disabled workers actually use available counseling services could never be probative of the nature of the relationship.

[23] The Employer's project manager testified that, if a disabled worker referred from an outside funding source experiences some sort of problem or difficulty, the Employer generally will contact the individual's outside funding source for assistance. There is no evidence that the Employer grants disabled workers paid time off or otherwise compensates them for time spent meeting with counselors or case managers.

[24] The project manager proffered one example of a disabled worker referred from an outside funding source who was sent to career services for "counseling" because she was experiencing difficulty in completing her assigned job tasks. However, he described neither the worker's job-related difficulties nor the nature of the counseling provided.

[25] In our view, Hines's unawareness of career services is significant, as the evidence suggests that, along with the site manager, the supervisor would be the person most likely to identify a disability-related problem needing assistance.

2. Terms and conditions of employment and production standards

In *Brevard*, the Board stated that one of the factors in the "primarily rehabilitative" analysis is "the applicable terms and conditions of employment (particularly in comparison to those of nondisabled individuals employed at the same facility)." Supra at 984. As indicated above, the Employer's disabled workers at issue here work the same hours, receive the same wages and benefits, and are subject to the same supervision and work rules as its nondisabled workers.

The Employer expects its disabled and nondisabled workers alike to complete their assigned cleaning tasks by the end of their 8-hour shifts. The maintenance of productivity standards to which disabled workers are required to adhere weighs against a finding of a primarily rehabilitative relationship.[26]

Some evidence in the record indicates that, when necessary, the Employer will modify job duties or work schedules or otherwise accommodate the disabled workers to enable them to successfully perform their jobs. For example, the Employer's project manager testified that disabled workers are provided breaks when necessary to allow them to take medication. Again, the project manager testified that the Employer assigns disabled workers to areas that are easier to clean and, additionally, modifies disabled workers' job tasks as necessary.[27]

However, the record also contains evidence that casts doubt on the foregoing testimony.[28] For example, former Supervisor Hines described a specific situation in which a diabetic individual, classified as disabled, was denied the opportunity to take his regular lunch break and, consequently, was rendered weak due to his inability to eat lunch or take his medication.[29] More tellingly, two former supervisors testified that, as supervisors, they were never made aware of any of the workers' disabilities, nor were they provided any guidance as to the types of assignments they should make; accordingly, they simply exercised their discretion in meting out assignments. Moreover, one of the former supervisors, Hines, testified that the Employer specifically told her *not* to make any accommodations for the disabled workers, and that doing so would be tantamount to "feeling sorry for them." Both Hines and another witness, nondisabled worker Jaclyn White, testified that there are no differences in the work performed by the various individuals on their respective shifts. Finally, White does not perform certain floor-care tasks identified as more difficult, while some disabled workers do perform those tasks.

Considering the above evidence as a whole, we are not persuaded that the Employer has shown that the disabled workers at issue here are subject to different terms and conditions of employment from those applied to the nondisabled workers, or that the Employer consistently draws any significant distinctions between the disabled and nondisabled workers in terms of its performance-related expectations and its assignment of tasks.

3. Disciplinary procedures

The Employer presented general testimony that it treats its disabled workers more leniently than its nondisabled workers. Project Manager Merritt, for example, testified that, whereas the Employer will enforce progressive disciplinary procedures against nondisabled workers who do not properly perform or complete their assigned tasks, with disabled workers it will discuss performance-related problems, attempt to ascertain the source of the difficulty, provide additional training or counseling as necessary, and, possibly, refer the disabled workers to the career services division for assistance. The Employer also presented evidence of a specific instance illustrating its comparative leniency toward disabled workers: Merritt contrasted a disabled worker who, prior to termination, was counseled[30] six times for

[26] See, e.g., *Baltimore Goodwill Industries v. NLRB*, supra, 134 F.3d at 230; *Goodwill Industries of Tidewater*, supra, 304 NLRB at 768; *Goodwill Industries of Denver*, supra, 304 NLRB at 765. To the extent that the ARD's decision suggests the contrary, i.e., that the absence of minimum productivity standards signals a lack of rehabilitative purpose, we disavow it.

Similarly, to the extent that the ARD's decision suggests that the absence of a wage differential based on merit or productivity evidences a lack of a rehabilitative purpose, it is inconsistent with extant Board law. See, e.g., *Lighthouse for the Blind of Houston*, 244 NLRB 1144, 1147 (1979); *Cincinnati Assn. for the Blind*, 235 NLRB 1448, 1448–1449 (1978).

[27] See also fn. 12, supra, in which Project Manager Merritt described an occasion on which the Employer accommodated a disabled worker by eliminating one of her assigned job duties.

[28] Contrast *Brevard*, in which there was no evidence that countered the employer witnesses' testimony reflecting the employer's more lenient and flexible approach toward the disabled workers with respect to performance and productivity, including testimony that they were not subject to production standards.

[29] Specifically, Hines testified that the disabled worker's supervisor assigned him to a task that would have taken him beyond his regular lunch break, that the supervisor was informed that the disabled worker could not take his medication if he did not eat, and that the supervisor's response was that the individual could eat and take his medication after he completed the assigned task.

[30] The "counselings" did not involve a referral to career services or to a case manager furnished through an outside funding source. Rather, it consisted of asking the worker whether anything was preventing him from completing his work, and telling him that it was important that he do so and the Employer expected him to do so. Thus, while evidencing greater leniency toward disabled workers, these "counselings" do not

failing to perform his assigned work duties, with a nondisabled worker who was counseled only three times for inadequate job performance prior to discharge.[31]

As with the previous *Brevard* factor, there is other record evidence that is arguably at odds with the foregoing evidence. Thus, contrary to the testimony of the Employer's vice president of human resources that it is important for the supervisors to be aware of disability status so that "they know how to interact with" those individuals,[32] two former supervisors testified that they were never made aware of any of the workers' disabilities or provided any guidance as to how they should treat the disabled workers. Although the supervisors' testimony gives us pause, it does not directly contradict the evidence that the Employer applies a more flexible, counseling-oriented model of discipline to its disabled workers, which weighs in favor of finding a rehabilitative relationship.[33]

4. Tenure of employment

Finally, we consider the evidence in this case relating to the disabled workers' "average tenure of employment, including the existence/absence of a job-placement program." *Brevard*, supra at 984. As set forth above in Section I, the Employer here does not employ anyone in the position of job-placement coordinator, nor does the Employer maintain a formal job-placement program.[34] Further, unlike in *Brevard*, there is no evidence indicating that disabled workers regularly transition to private competitive employment. Cf. id. at 987 (noting uncontradicted testimony that disabled workers "routinely" transition to private employment). Indeed, the uncontradicted testimony of Project Manager Merritt indicates that only one disabled worker was referred for outside employment in the 2 years preceding the hearing, and that only approximately four to five employees were referred for outside employment in the prior 5 years. This factor weighs against finding the Employer's relationship with its disabled workers to be primarily rehabilitative.[35]

C. Conclusion

We find that the Employer has not met its burden of showing that its relationship with its disabled workers is primarily rehabilitative. As explained above, the Employer offers limited counseling and rehabilitative services (perhaps because the workers the Employer classifies as disabled have comparatively little need for such services); it does not make any significant distinctions between its disabled and nondisabled workers with regard to terms and conditions of employment and production standards; and it has not shown that it seeks to and does transition its disabled workers to private competitive employment. Although the factor of disciplinary standards cuts the other way, it is insufficient by itself to dictate a different outcome. Accordingly, we find that the disabled workers at issue here are statutory employees, and that the Acting Regional Director properly directed an election in a unit consisting of the Employer's disabled and nondisabled janitorial workers at CDC Chamblee.

furnish support under the "counseling and rehabilitative services" factor analyzed above.

[31] Merritt also sought to contrast the 1-day suspension handed out to a disabled worker for refusing to perform a task assigned by his supervisor (because he needed to clean the director's area, a task that he believed to be a higher priority), with the suspension and ultimate discharge of a nondisabled worker for instigating an altercation and concomitantly failing to heed his supervisor's instructions. In our view, this testimony is not probative of the issue before us, as the conduct of the disabled worker was not comparable to that of the nondisabled worker.

[32] More specifically, he testified that "[the supervisors] know, based on the handbook, that progressive discipline should be administered, how it should be administered, and if, in fact, we have an individual in the workplace that has a disability and they need to be referred back to the Career Services group for more training, versus severing that employee's employment."

[33] We disavow the Acting Regional Director's statement that the fact that the disabled workers ultimately are subject to severe disciplinary sanctions evidences a typical private-sector employment relationship. To the contrary, the Board has held that an employer's imposition of discipline (including discharge) in extreme cases is not inconsistent with a primarily rehabilitative relationship. See, e.g., *Goodwill Industries of Denver*, supra at 765.

[34] The Employer's project manager described a situation in which a disabled worker expressed an interest in obtaining employment in a different field, and the Employer's career services division assisted her in making that transition. However, placement efforts that are informal, ad hoc, and "not all too successful" weigh against a primarily rehabilitative finding. *NLRB v. Lighthouse for the Blind of Houston,* 696 F.2d 399, 405 (5th Cir. 1983), enfg. 248 NLRB 1366 (1980).

[35] There is no evidence to support the Employer's contention that the rate of transition to private competitive employment is so low because the disabled workers want to remain with the Employer because of favorable wages and other conditions of employment.

ORDER

This proceeding is remanded to the Regional Director for further appropriate action consistent with this decision.

Dated, Washington, D.C. June 21, 2007

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD